Supreme Court, U.S.
FILED

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No. ____

IN THE

Supreme Court of the United States

DAVID ACOSTA

Petitioner,

v.

MARIE D. CAMPBELL, ET AL,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eleventh Circuit erred interpreting the Fair Debt Collection Practices Act in a manner contrary to longstanding federal law and stated legislative intent by judicially engrafting into the statute unauthorized exemptions to compliance favoring debt collector attorneys but that deprive consumers of their 14th Amendment right to equal protection under the law.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list of identifies all of the parties appearing here and before the United States Court of Appeals for the Eleventh Circuit.

The petitioner here and appellant below is David Acosta. The appellees below and respondents here are Law Offices of David J. Stern, P.A.; Marie D. Campbell; Gregg Dreilinger; Citimortgage, Inc.; Citibank, FSB; Mortgage Capital Associates, Inc.; Residential Funding Corporation; Jay M. Steren; and Imelda W. Lay.

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DECISIONS BELOW

The opinion of the Court of Appeals was not selected for publication in the Federal Reporter, however the Westlaw citation is *Acosta v. Campbell*, 2006 WL 146208 (M.D.Fla.)) (C.A.11 (Fla.)) and a copy is reprinted in the Appendix to the Petition. The District Court's opinion is 2006 WL 3804729 (M.D.Fla. 2006) and is included in the Appendix to the Petition.

JURISDICTION

The Court of Appeals entered its judgment on January 28, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of 15 U.S.C. § 1692, *et seq.* AND § 559 Part VI Florida Statutes. The pertinent provisions are reproduced in the Appendix.

STATEMENT OF THE CASE

This is one of the most important consumer protection cases to come before this Court since *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489, (U.S.Ill.,1995), where the Court held that debt collector attorneys were subject to regulation under the Fair Debt Collection Practices Act ("FDCPA"), codified at 15 U.S.C. § 1692, *et seq.*, nearly 15 years ago. At stake are valuable rights under federal consumer law that has been truncated with incorrect decisions of the Eleventh Circuit that effectively frustrates congressional intent and is in conflict with

decisions of this Court in *Heintz* and with decisions of other Circuits.

Resolution of the question presented here will decide a highly visible and standing split between the Eleventh Circuit and holdings of the Second, Third, Fourth, Fifth, Sixth, Seventh and Tenth Circuits. Specifically, THE Circuit Courts are split on interpretations of the FDCPA regarding whether attorney debt collection activity is beyond the reach of the FDCPA. The most visible conflict among the Circuit Courts relates to 15 U.S.C. § 1692g(b), which requires a debt collector to verify a debt that has been timely disputed by a consumer. The Act, at 15 U.S.C. § 1692g, requires a debt collector to provide a consumer/debtor with notice of the right to dispute the validity of a debt subject of debt collection activity. The Eleventh Circuit held in *Vega v. McKay*, 351 F.3d 1334 (11th Cir. 2003), that when the statutorily-required notice is given to a consumer by a debt collector together with "a summons and complaint package", the *notice* is insufficient to trigger the debt collector's requirement to comply with the verification provisions of the Act because the notice is not deemed an "initial communication". No other Circuit Court has expressed agreement with this conclusion.

The Circuit Court's decision, affirming the District Court's dismissal of petitioner's claims based on the holding in *Vega*, essentially approves continuing extensions of judicially-created exemptions to compliance with the FDCPA.

ARGUMENT

This case presents an exceptionally important question of federal law because exemptions

introduced by the Eleventh Circuit, with its decisions, deprive consumers in that Circuit, of their 14th Amendment right to equal protection under the law. The *Vega* decision, as one example, denies consumers *in the Eleventh Circuit* the right to invoke protections of the FDCPA for disputing debts subject of legal action. This condition results in a 14th Amendment violation because consumers in other Circuits are not so deprived and can look to the Court for enforcement of the FDCPA when debt collector refuses or fails to comply with verification of timely dispute debts. Consumers of the Eleventh Circuit cannot look to the courts for enforcement of the FDCPA for the same debt collector infractions because of the holding in *Vega*. This holding authorizes the debt collector to cloak the notice of the right to dispute the debt by delivering it with a summons and complaint, thereby depriving the consumer of the very right the legislature intended he consumer to have. The legal effect is like giving notice in a glass case. The consumer can see and presumably understand the right, but cannot exercise the right it because of the way it was received.

Petitioner also shows the Court that *Vega* is in direct conflict with this Court's pronouncements in *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489, (U.S.Ill.,1995), which clarified that the FDCPA applies to attorneys engaged in debt collection, including legal activities. If the Eleventh Circuit is correct with its decision in *Vega*, then *Heintz* has been overruled *sub silentio*.

One argument advanced by respondents, and that may be asked by this Court, is that the FDCPA was recently amended to specifically exclude a

formal pleading in a civil action from the definition of "initial communication".[1] This argument, however, is not dispositive of the inter-circuit conflict because the required FDCPA debt validation notice, even when delivered as part of service of process with a complaint, is neither a "pleading" nor forms any part of the complaint, summons, or notice of lis pendens. The Act exempts only "a formal pleading" from being deemed an initial communication. There is an abundant amount of case interpreting the definition of pleading.[2]

Debt collector attorneys, however, simply insert the required notice as a page inside the collection of documents comprising a summons and complaint package in hopes that *the power of the staple*, together with the power of the *Vega* decision, will yield an exemption from the compliance with the verification requirements of the Act. So far, they have been successful convincing the Eleventh Circuit with the argument. Even more troubling now is that *Vega* is being extended to frame new exemptions to compliance with the FDCPA as shown by the decision below.

Resolution of this Circuit split is urgently needed to restore consumers to valuable rights that have been lost by these decisions and to bring clarity and uniformity among the Circuits on this important question of law. For all the foregoing reasons, and as more fully set out below, this Court should grant the petition.

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[1] 15 U.S.C. 1692g(d)

[2] The Act does not separately define "formal pleading".

A. FACTUAL BACKGROUND

1. In July 2003 respondents Marie D. Campbell and Law Offices of David J. Stern, P.A. ("the Attorneys") filed a mortgage foreclosure action against petitioner in Seminole County Circuit Court, Florida, on behalf of their client and respondent Citimortgage, Inc. ("CM"). The Attorneys served petitioner with a 27-page document consisting of a summons, complaint, notice of lis pendens, and the FDPCA notice of the right to dispute the debt (on page 9). Believing that the foreclosing plaintiff did not have the right to bring the action, petitioner sought verification by sending a timely notice of dispute to respondents who were prosecuting the action. The Attorneys failed or refused to adequately verify the disputed debt and continued prosecution of the foreclosure insisting that petitioner owed money to their client. The assertion was proven false.

2. Approximately one year later the foreclosure complaint was dismissed when the state court judge presiding over the foreclosure action examined the original promissory note and observed a restrictive endorsement by the foreclosing plaintiff in favor a non-party to the action.[3] The foreclosing plaintiff later admitted, in a deposition, that the wrong party had brought the action. This is exactly the type of situation that a dispute under the FDCPA was designed to resolve, and would have been resolved if the debt collector attorneys had taken seriously their duty to properly verify the debt.

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[3] It remains undisputed petitioner owed nothing to the foreclosing plaintiff.

3. **The Claims.** On May 21, 2004, petitioner brought an action in District Court against the Attorneys for violations of the FDCPA. The Complaint was later amended to add respondent CM and expanded the claims to include other causes of action that are not subject of this petition. Respondents defended petitioner's action by asserting that they were not bound to comply with the verification requirements under the FDCPA on grounds that the notice of the right to dispute a debt is not an initial communication and that they had complied with the Act supplying verification by providing a computer printout of payment history on the mortgage loan. The District Court dismissed the claims on the strength of *Vega* and by creating new exemptions. Petitioner's claims, *inter alia*, were based on the following violations:

First Three Claims: a) debt collector's failure to verify the debt after petitioner's delivery of a timely notice of dispute, violating 15 U.S.C. § 1692g(b); b) contacting petitioner at 7:20 am on July 24, 2003, a time disallowed by the statute, violating 15 U.S.C. § 1692c(a)(1); c) serving petitioner with a summons and complaint in a manner that overshadowed the notice of the right to dispute the debt, violating 15 U.S.C. § 1692g(a). Each of these claims was dismissed for failure to state a claim on grounds that the *notice* of the right to dispute the debt was not an "initial communication" pursuant to *Vega*. **Exemption No. 1**

4. **Fourth Claim:** d) communicating with a third- party information about the debt without the prior consent of the consumer or court order, violating 15 U.S.C. § 1692c(b). The District Court

disposed of this claim by creating *a new exemption* for debt collectors and their attorneys holding that "[A]s a practical matter, in a state foreclosure action, the first and second mortgage holders and other creditors must be able to communicate regarding the balance or settlement of the outstanding mortgages." The Eleventh Circuit's opinion affirming as to this specific point effectively expands *Vega* to result in additional exceptions favoring debt collectors. This exemption stands dangerously close to inviting formation of a new industry that would pierce the privacy provisions of the FDCPA and allow mortgage companies, and others, to maintain private mortgagor debtor lists with impunity.[4] **Exemption No. 2**

5. **Fifth Claim:** e) failing to disclose that communications sent to petitioner was from a debt collector, violating 15 U.S.C. § 1692e(11). The District Court disposed of the fifth claim by injecting an unauthorized "ample notice" exemption to 15 U.S.C. § 1692e(11) and disregarding the plain meaning of the word "pleading", despite petitioner's provision of on-point interpreting case law. **Exemption No 3**

6. **Sixth and Seventh Claims:** f) filing a lawsuit in the name of a party not legally entitled to sue petitioner, violating 15 U.S.C. § 1692e(2)(a); and g) using a false representation or deceptive means to collect or attempt to collect a debt, violating 15 U.S.C. § 1692e(10). Petitioner's sixth and seventh claims were disposed of by rationale that disregards

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[4] This would also violate 15 U.S.C. 1692d(3)

over 200 years of jurisprudence relating to negotiable instruments. These two claims centered on the foreclosing plaintiff's misrepresentation that it *owned* and held the promissory note subject of the state action. An endorsement appearing on the face of the original note clearly evidenced that the foreclosing plaintiff did not own the note but that it had previously endorsed and negotiated the instrument to a non-party to the foreclosure action. Consequently the state court dismissed the complaint.

The District Court found that petitioner did not state a claim for the foreclosing plaintiff's misrepresentation of the amount, character, or legal status of the debt because, even though the foreclosing plaintiff did not *own* the note, contrary to its representation in its pleadings and to the court, it *held* the mortgage.

Despite ample authority provided to the District Court, and to the Eleventh Circuit Court on appeal, showing that the mortgage follows the note, which remains good law in Florida, the District Court disregarded the fact that a formal assignment of the mortgage was unnecessary to carry the mortgage with it when the note was endorsed and negotiated to another entity. After endorsement of the note, absent an express agreement, the endorser no longer retained the right to foreclose on the mortgage. Therefore, the foreclosing plaintiff did misrepresent the debt and used false means attempting to obtain a judgment against petitioner. **Exemption No. 4**

State Law Claims. The District Court also dismissed of each and every one of petitioner's seven (7) claims brought pursuant to the Florida Consumer

Collection Practices Act (FCCPA), codified at § 559 Part VI Florida Statutes, *et. seq.*, by applying only federal law rather than Florida law.

As an example, petitioner's claim for violation of F.S.A. § 559.72(9) and F.S.A. § 559.72(17) (contacting a consumer at a time that is disallowed) was dismissed on grounds that the communication was not an "initial communication". However, the FCCPA contains no language regarding any "initial communication", much less any implied requirement that the Court could have applied to dismiss the claim. The District Court followed this same pattern to dismiss all seven (7) claims brought under Florida law. **Exemption No. 5**

Petitioner characterizes the Court's decisions as "exemptions" because the ruling, along with the opinion by the Court, serves as a blueprint for debt collectors to avoid compliance with the FDCPA and the FCCPA. These exemptions, more like loopholes, are not supported by the plain and clear language of these consumer protection statutes and this Court should grant this petition to bring clarity and uniformity to the application of this important consumer law.

B. PROCEEDINGS BELOW

1. On May 21, 2004 petitioner, unrepresented by counsel, brought an action in the U.S. District Court for the Middle District of Florida against the respondents for violations of the FDCPA in connection with a mortgage foreclosure action in Circuit Court, Seminole County Florida. The complaint was amended several times to add parties and additional claims. On August 3, 2005 the

petitioner filed his third Amended Complaint against the respondents asserting claims pursuant to consumer protection statutes under the FDCPA; Florida Consumer Collection Practices Act (FCCPA) and the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). The suit also asserted claims for fraud, under federal and state RICO statutes, for the creation and collection of an unlawful debt alleging he was induced by an unlicensed mortgage lender to execute multiple promissory notes totaling $920,000, double the amount of his mortgage loan.[5]

2. On January 18, 2006 the District Court dismissed all but two of the petitioner's causes of action for failure to state a claim. The remaining claims were decided against petitioner on Summary Judgment with the District Court's Order of December 26, 2006 to which a timely appeal followed to the Eleventh Circuit Court of Appeals. The Circuit granted oral argument, to which all parties participated through counsel. Petitioner was unrepresented throughout the entire appeal process but attended and participated in oral argument.[6]

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[5] The complaint was amended twice on grounds of newly discovered evidence. Petitioner asserted that respondents were actively shielding documents and facts that supported his causes of action.

[6] The Circuit Court appointed petitioner legal counsel for purposes of the appeal. However, the attorneys selected by the Court filed motions to withdraw on conflict of interest grounds. It should be noted that the opinion of the Circuit Court incorrectly reflects that petitioner was represented by attorney Eric P. Schroeder.

3. On January 28, 2009 the 11th Circuit affirmed with an opinion and adopted the District Court's findings and conclusions. The Panel clarified as to one of the legal issues relating to whether communications between attorneys connected to a foreclosure action violates the FDCPA when they exchange information in a manner not allowed by the Act. The Eleventh Circuit panel's opinion, as previously stated, effectively extended the holding in *Vega* to allow conduct that would otherwise violate the FDCPA.

REASONS FOR GRANTING THE PETITION

This case presents an exceptionally important question of federal law that has not been but should be settled by this Court, and on which the circuits are in conflict: Does a consumer lose the right under the FDCPA to dispute the validity of a debt, being collected through legal action, when the statutorily-required notice of that right is delivered to the consumer together with a summons and complaint? The answer to that question, which points to an inter-circuit conflict, is vitally important to the consumers living in the region of the Eleventh Circuit.

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S HOLDING IN HEINTZ

A. The decision below appears to undo that which this Court settled long ago, that debt collector attorneys must comply with the Fair Debt Collection Practices Act.

1. ***Heintz v. Jenkins.*** The FDCPA contains no language expressly empowering any governmental agency, or the Courts, to create exemptions for debt collector compliance with the Act. Notwithstanding this limitation, the Eleventh Circuit's ruling frames out new exemptions to compliance with the Act, for debt collector attorneys, that stand in direct conflict with congressional intent and with this Court's decision in *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489, (U.S.Ill.,1995).

The FDCPA was enacted in September 1977 with the purpose of eliminating abusive practices by debt collectors, insuring that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and promoting consistent state action to protect consumers against debt collection abuses.[7] As originally drafted, the Act specifically exempted attorneys from liability within the definition of "debt collector." 15 U.S.C. 1692a(6)(f) (1977).

On November 26, 1985, the House Committee of Banking, Finance and Urban Affairs reported on a

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[7] 15 U.S.C. § 1692(e)

proposed amendment to the Act which would repeal the attorney exemption. *H.R. Rep. No. 405, reprinted in 1986 U.S. Code Cong. & Admin. News at 1752.* In that report, the Committee detailed how, since the passage of the Act, attorneys had entered the debt collection industry so that the number of attorney debt collectors exceeded the number of lay debt collectors. *Id.* The Committee went on to note several abusive practices prohibited by the Act which attorneys, but not lay debt collectors, could engage in because of their exemption. These included:

> Late night telephone calls to consumers, calls to consumers' employers concerning the consumers' debts, frequent and repeated calls to consumers, disclosure of consumers' debt to third parties, threats of legal action on small debts where there is little likelihood that legal action will be taken, simulation of legal process, harassment, abuse, threats of seizure, and attachment and sale of property where there is little likelihood that such action will be taken. *Id.* at 1755.

In 1986, Congress amended the Act to delete the attorney exemption. This amendment closed the loophole that allowed attorneys engaged in the targeted, unsavory debt collection activities to avoid the protection of the Act merely because they had obtained a law degree. *H.R. Rep. No. 405, reprinted in U.S. Code, Cong. & Admin. News at 1754.* This amendment became necessary because abuses in the debt collection process moved from debt collectors to attorneys who were not subject to compliance with the FDCPA.

In 1995 this Court settled a longstanding debate over whether certain attorney conduct was exempt

from the FDCPA with its decision in *Heintz*. In *Heintz* the legal industry, speaking through the petitioner (Heintz), argued vigorously that attorneys were exempt from compliance with the FDCPA when lawyers engage in legal activities that was not believed to be debt collection. This Court, speaking with great clarity and rejecting all of the arguments, decided that attorneys and their legal activities are governed by the Act. Since *Heintz*, however, debt collector attorneys have sought relief through pursuit of judicially-created exemptions. With its ruling affirming the lower Court, in this case, the Eleventh Circuit continues to grant such relief.

2. Conflict with *Heintz*. The Eleventh Circuit's decision is in direct conflict with *Heintz* because the very debt collector conduct this Court determined was governed by the Act has been exempted by the ruling in the following three ways.

First, the Eleventh Circuit exempts debt collector attorneys, and in fact grants a form of immunity, from liability for violating the verification requirements of 15 U.S.C. § 1692g(b) based on the holding in *Vega* when a consumer disputes a debt in response to a debt validation notice that has been delivered inside "a summons and complaint package".[8] This exemption extends to anything required by the Act related to "an initial communication". This exemption is grounded on the Circuit Court's interpretation of what is an "initial communication" for purposes of the FDCPA. Here, it is clear the Court appears to have departed from

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[8] This phrase, "'a summons and complaint package" is not found anywhere in the statutory language of the FDCPA.

applying canons of statutory interpretation. ***See*** *Caminetti v. U.S., 242 U.S. 470 (1917).* Debt collector attorneys who once were compelled to comply with the Act, under *Heintz*, are now exempted in the Eleventh Circuit.[9]

Second, with the decision in the instant case, attorneys engaged in debt collection by legal action against consumers received free-pass from having to comply with requirements to refrain from communicating with third parties about the consumer debt. The FDCPA prohibits debt collectors from communicating information about a debt to third parties without the express consent of the consumer or express permission by a court.[10] However, the Eleventh Circuit affirmed the District Court's reasoning that that attorneys should be exempt from compliance with 15 U.S.C. § 1692c(b) on grounds debt collector attorneys for first and second mortgage holders and other creditors must be able to communicate regarding the balance or settlement of the outstanding mortgages. Notwithstanding that the Act provides an avenue for compliance, the Eleventh Circuit's ruling allows attorneys to circumvent the limitation imposed by the Act, in direct conflict with the plain language of the statute and the holding in *Heintz*.

Third, according to the ruling of the District Court in the proceedings below, attorneys can now

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[9] The definition communication is found at 15 U.S.C. § 1692a(2), "[T]he term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium."

[10] 15 U.S.C. § 1692c(b)

avoid compliance with noticing requirements of 15 U.S.C. § 1692e(11).[11] The Act requires that the initial communication, as well as each subsequent communication with the consumer, contain the required "mini Miranda" notice. The District Court, however, reasoned that this is not necessary because the consumer, in this case the petitioner, had prior notice that prior communications were from the debt collector attorneys. This amounts to a new form of "prior notice" exemption that is neither implied nor authorized by the statute. Again, *Heintz* appears to have been overruled to benefit attorney debt collectors.

II. DECISIONS OF THE ELEVENTH CIRCUIT EXEMPTING LEGAL ACTIVITIES FROM THE FDCPA ARE IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS

A. No Circuit Court agrees with the Eleventh Circuit's position that debt collection litigation activities fall outside the coverage of the FDCPA.

As observed by the Fourth Circuit in *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226 (4d Cir.2007), [A]ll Circuits to consider the issue, except for the Eleventh, have recognized the general principle that the FDCPA applies to the litigation activities of

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[11] The debt collector must convey "that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action."

attorneys who qualify as debt collectors under the statutory definition.[12] On the surface it appears debt collector attorneys continue to battle and resist the *Heintz* decision, and in some cases ignore it altogether when arguing in favor of some exempted conduct. Only the Eleventh Circuit appears to be entertaining and accepting these arguments.

It is unlikely petitioner's claims would have suffered dismissal in another Circuit on the grounds asserted by the respondents and that formed the basis of the District Court's decision.

B. No other Circuit agrees with the Eleventh Circuit's holding in *Vega*.

Below are statements of other Circuit Courts recognizing both that delivery of a summons and complaint is an initial communication, and that attorney debt collection is governed by the FDCPA.

1. The Second Circuit. *Goldman v. Cohen,* 445 F.3d 152, 155 (2nd Cir.2006) (acknowledging disagreement with the Eleventh Circuit)

[W]e hold that the District Court did not err in concluding that Cohen's initiation of a lawsuit in state court seeking recovery of back rent and attorneys' fees was an "initial communication" within

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[12] See, e.g., Goldman v. Cohen, 445 F.3d 152, 155 (2nd Cir.2006); Todd v. Weltman, Weinberg & Reis Co., L.P.A., 434 F.3d 432, 446 (6th Cir.2006); Piper v. Portnoff Law Assocs., Ltd., 396 F.3d 227, 232 (3d Cir.2005); Thomas v. Law Firm of Simpson & Cybak, 392 F.3d 914, 917 (7th Cir.2004) (en banc); Johnson v. Riddle, 305 F.3d 1107, 1117 (10th Cir.2002); Addison v. Braud, 105 F.3d 223, 224 n. 1 (5th Cir.1997)

the meaning of § 1692g(a). In so holding, we join at least one sister circuit. See *Thomas v. Law Firm of Simpson & Cybak*, 392 F.3d 914 (7th Cir.2004) (en banc), rev'g 354 F.3d 696 (7th Cir.2004). In *Thomas*, the Court of Appeals for the Seventh Circuit, convened en banc, held that a debt collector's initiation of a lawsuit constitutes an "initial communication" for purposes of the FDCPA. See also *Sprouse v. City Credits Co.*, 126 F.Supp.2d 1083, 1089 n. 8 (S.D.Ohio 2000) ("A lawsuit initiated to collect debts is certainly included within th[e] definition [of 'communication' in 15 U.S.C. § 1692a(2)].").

2. **The Seventh Circuit.** *Thomas v. Law Firm of Simpson & Cybak*, 392 F.3d 914 (7th Cir.2004) (en banc), rev'g 354 F.3d 696 (7th Cir.2004)

[W]e hold that Simpson's service of the summons and complaint was an "initial communication," which triggered its obligation to notify Thomas of his validation rights. In so holding, we recognize that we part company from the Eleventh Circuit, which reached a contrary result. *See* ***Vega,*** *351 F.3d at 1337.* But the Eleventh Circuit relied principally on non-binding Federal Trade Commission ("FTC") staff commentary issued before *Heintz, see* Federal Trade Commission--Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed.Reg. 50097, 50108 (1988), to which we do not give significant weight. *See Heintz*, 514 U.S. at 298, 115 S.Ct. 1489 (declining to give much weight to FTC staff commentary discussing the FDCPA's application to attorneys). Indeed, the FTC itself, in a more recent Advisory Opinion letter issued in 2000

noted the following: "In light of *Heintz,* the Commission concludes that, if an attorney debt collector serves on a consumer a court document 'conveying information regarding a debt,' that court document is a 'communication' for purposes of the FDCPA."

3. The Fourth Circuit. *Sayyed v. Wolpoff & Abramson,* 485 F.3d 226 (4d Cir.2007)

All circuits to consider the issue, except for the Eleventh, have recognized the general principle that the FDCPA applies to the litigation activities of attorneys who qualify as debt collectors under the statutory definition. *See, e.g., Goldman v. Cohen,* 445 F.3d 152, 155 (2nd Cir.2006); *Todd v. Weltman, Weinberg & Reis Co., L.P.A.,* 434 F.3d 432, 446 (6th Cir.2006); *Piper v. Portnoff Law Assocs., Ltd.,* 396 F.3d 227, 232 (3d Cir.2005); *Thomas v. Law Firm of Simpson & Cybak,* 392 F.3d 914, 917 (7th Cir.2004)(en banc); *Johnson v. Riddle,* 305 F.3d 1107, 1117 (10th Cir.2002); *Addison v. Braud,* 105 F.3d 223, 224 n. 1 (5th Cir.1997); *but see Vega v. McKay,* 351 F.3d 1334, 1337 (11th Cir.2003)

4. The Sixth Circuit. *Federal Home Loan Mortg. Corp. v. Lamar,* 503 F.3d 504 (6d Cir.2007)

Given the state of the law at the time Lamar initiated suit against LS & R and the subsequent amendment by Congress, the district court did not err in its assumption. We likewise assume that a summons and complaint was an "initial communication" at the time Lamar brought suit.

5. The Third Circuit. *Piper v. Portnoff Law Assocs., Ltd.,* 396 F.3d 227, 232 (3d Cir.2005)

We have already noted that, if a communication meets the Act's definition of an effort by a "debt collector" to collect a "debt" from a "consumer," it is not relevant that it came in the context of litigation. Heintz v. Jenkins, 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995). The same is true where the communication comes in the context of in rem litigation.

6. The Fifth Circuit. *Addison v. Braud,* 105 F.3d 223.

As the Supreme Court recently held in *Heintz v. Jenkins,* the FDCPA applies to attorneys who regularly engage in debt collection litigation. 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995)

III. HOW THE VEGA DECISION BECAME LAW IN THE ELEVENTH CIRCUIT

A. The cases leading up to Vega and the conflict between the Southern and Middle Districts of Florida.

1. The Martinez Case. Prior to *Vega*, the Eleventh Circuit had correctly interpreted the statute when it affirmed both the District Court and the Bankruptcy Court on almost identical set of facts as in petitioner's case, and with the same debt collector attorneys that are respondents in this action. In *Martinez v. Law Offices of David J. Stern, P.A.* 266 B.R. 523, 533 (Bankr.S.D.Fla.2001), the law offices were defendants in an action brought by Mr. Martinez for violating the FDCPA. At the center of the dispute was Martinez's claim that the required validation notice was overshadowed, confusing and

ineffective because it was delivered inside a summons and complaint package that contained conflicting time periods to respond.[13]

The Bankruptcy Court rejected each of the law firm's arguments finding that the notice was an initial communication, even though it was the eighth page of a 16-page summons and complaint package. To reach this conclusion the Court had to first determine the required debt validation notice delivered with the summons and complaint package was an initial communication. Otherwise such notice could not be overshadowed because it would not be relevant to the FDCPA's noticing requirement of 15 U.S.C. § 1692g. The Court further found that the notice was, in fact, confusing to the consumer because of the conflicting timeframes to respond.[14] The decision was affirmed by both the District Court and the Eleventh Circuit.[15]

2. The McKnight Case. Shortly after the District Court's ruling affirming *Martinez* but before that case reached the 11th Circuit, *McKnight v. Benitez,* 176 F.Supp.2d 1301 (M.D.Fla.,2001) was decided. In *McKnight* a consumer plaintiff (McKnight) filed an action alleging that the debt collector attorney (Benitez) violated the FDCPA by bringing an action in the wrong venue and by giving the required validation notice in a manner that

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[13] In violation of 15 U.S.C. 1692g(a)

[14] The Florida summons required 20 days to respond to the complaint, while the FDCPA debt validation notice allowed 30 days for response.

[15] *In re Martinez*, 311 F.3d 1272 C.A.11 (Fla.),2002

overshadowed and was contradicted by the language in the summons, thereby rendering this notice ineffective in violation of 15 U.S.C. § 1692g(a).

The District Court found that the summons and complaint package, containing the required notice, was *not* an initial communication within the meaning of 15 U.S.C. § 1692g and dismissed for failure to state a claim on that part of the action but leaving intact the claim for bringing an action in the wrong venue. The District Court acknowledged the Bankruptcy Court's *Martinez* decision but disagreed with the holding on grounds, *inter alia*, that there "was no discussion about why a legal action should be considered a "communication"." The District Court decision was not appealed. Next up was the *Vega* case.

B. The Eleventh Circuit's error in deciding Vega can be fairly traced to the Court's reliance on an outdated, non-binding and overruled FTC Staff Opinion.

1. The Vega Case. About one year after the Martinez was decided by the Circuit Court, the Eleventh Circuit took a different position on the exact same legal issue with its holding in *Vega*.[16] In *Vega*, consumers sued a law firm for violating the FDCPA in connection with a Small Claims Court action where the consumer defendants were served with a summons and complaint package containing the required FDCPA debt validation notice. The defendants brought an action against the law firm

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[16] *Vega v. McKay*, 351 F.3d 1334 (11th Cir. 2003)

for violating the FDCPA on the same grounds as in *McKnight*. The same District Court that ruled on *McKnight* dismissed the Vega's claim on grounds that the debt validation notice contained inside the summons and complaint package was *not* an initial communication for purposes of the FDCPA. On appeal, the Eleventh Circuit affirmed.

The Circuit's decision was grounded, in part, on what appears to be a very narrow review of available authority to guide the Court. In reaching its decision the Eleventh Circuit relied heavily on a 1988 Federal Trade Commission Staff Opinion that preceded *Heintz* and that the FTC acknowledged had been overruled. Language in the Court's opinion provides insight into how much weight was given the FTC Staff Opinion where it appears: *"In making this decision we give serious consideration to the interpretation put forth by the Federal Trade Commission which is the agency changed (sic) with enforcing the provisions of the FDCPA and has developed the expertise in this area."* The Court then quoted *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1188 n. 11 (11th Cir.2001) to emphasize that *"it is enough to observe that the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."*

The Eleventh Circuit Court's research or analysis does not appear to have considered more recent FTC commentary dated March 31, 2000, that repudiated the prior opinion stating: *"In light of Heintz, the Commission concludes that, if an attorney debt collector serves on a consumer a court document 'conveying information regarding a debt,' that court*

document is a 'communication' for purposes of the FDCPA."[17] The fact that the Eleventh Circuit relied on an outdated, non-binding and overruled FTC Staff Opinion is widely known and observed in opinions by sister Circuits. ***See*** *Sayeed v. Wolpoff,* supra. Nonetheless, *Vega* became the law in the Eleventh Circuit and since the decision no Alabama, Florida or Georgia consumers have been able to obtain any relief from federal courts on this legal issue.

IV. THE DECISION BELOW IS WRONG IN THREE RESPECTS

A. The Circuit Court misinterpreted, misapplied or extended the law in a way that frustrates the stated purpose of the FDCPA

In affirming the lower court, the Circuit appears to have extended, modified or superseded the statute by how it applied the law to the facts of petitioner's claims. In doing so, new exceptions to compliance have now been judicially inserted into the reading of the FDCPA that frustrate the legislative intent.

1. 15 U.S.C. § 1692g. A reading of the plain and clear language of the statutes subject of this petition readily reveals that the Circuit Court misinterpreted the law, misapplied the law, or judicially superseded the statute. The Circuit Court first misinterprets 15 U.S.C. § 1692g by disregarding the definition of "communication" found at 15 U.S.C. §1692a(2).

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[17] Federal Trade Commission-Staff Opinion Letter of March 31, 2000, at 3.

The statute defines communication as broadly as could be possible, stating: "The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium." Therefore, delivery of the debt validation notice given to a consumer for the first time *is* the "conveying of information regarding a debt to any person (the consumer) where the summons and complaint package *is* the medium.

The argument accepted by the Eleventh Circuit is that by surrounding the required debt validation notice with other documents, such as a complaint and summons, somehow purges its effectiveness to require debt compliance with the verification requirements upon a consumer's timely dispute. This ideology implies that the debt validation notice becomes part of the "pleading" so as to make the notice fall outside the definition of an "initial communication" under the Act.

A closer examination of the documents stapled in front or in back of the debt validation notice will show the hollowness of the argument. A **summons** is a notice given by the court commanding some action on the part of the litigant. The debt validation notice is not a part of a summons. A **complaint** is a formal pleading, which unless the debt validation notice is not required, unless it is needed as an exhibit to support a stated cause of action. A **Notice of Lis Pendens** in a foreclosure action generally announces pending legal action in connection with real property and also does not require attachment of the debt validation notice. Therefore, even if attached together, there is no legal connection between these documents in a way that results in the

impotence of the notice suggested by debt collector attorneys and the Circuit Court.

This misinterpretation of the law frustrates the stated purpose of the FDCPA by redefining a key word or phrase that then limits or eliminates enforcement of the Act.

2. 15 U.S.C. § 1692c(b). The Circuit Court superseded or extended 15 U.S.C. § 1692c(b)(prohibiting debt collector communication about a debt except by consent of the consumer or by permission of a court) by reasoning that debt collector attorneys must be able to communicate with each other regarding settlement of mortgage balances. The Court's reasoning is unnecessary because the statute does not disallow the communication, but rather outlines how it can be accomplished in compliance with the FDCPA. This extension of the Act unfairly authorizes and encourages debt collectors to look past the clear and unambiguous language of this section and escape liability for violations. It also suggests the free sharing of information about consumer debts outside the only two methods authorized by the statute. The purpose of the Act is thereby frustrated or defeated.

3. 15 U.S.C. § 1692e(11). The Court misinterpreted 15 U.S.C. § 1692e(11)[18] by disregarding the part of the statute requiring the debt collector "to disclose in *subsequent*

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[18] (requiring notice to the consumer with every contact that the communication is from a debt collector, for the purpose of collecting a debt and that information obtained will be used for that purpose)

communications that the communication is from a debt collector". The District Court engrafts right into the Act an *ample prior notice exemption* not supported by any reading of that section or of the entire chapter. This judicially-created "prior notice" exception poses a risk to consumers in that it may make unclear the purpose of a debt collector's communications subsequent to the initial contact. It also suggests that subsequent communications may be disguised as non-debt-collector contact for purposes of inducing a consumer to respond. This also frustrates the stated purpose of the FDCPA.

4. 15 U.S.C. § 1692e(2)(a) and 15 U.S.C. § 1692e(10). Next, the Circuit Court misapplied the law in deciding that petitioner had not stated a claim for relief for the respondent's misrepresentations in the state foreclosure action, claiming it owned and held a promissory note and mortgage. The Circuit Court affirmed that the foreclosing plaintiff did not misrepresent the amount, character or legal status of the debt because respondent Citimortgage, Inc. *held the mortgage* while Citibank, FSB *held* the promissory note.

The Circuit Court's misapplication of the law becomes clear when contrasted against prior holdings of this Court and standing Florida law governing negotiable instruments and secured transactions. The holding ignores the well-settled principle that a mortgage and the promissory note it secures are inseparable.[19] Florida law is also settled that when a promissory note is negotiated or

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[19] *Carpenter v. Longan*, 83 U.S. 271 (U.S., 1872); *Hemphill v. Nelson*, 116 So. 498, (Fla., 1928)

assigned it carries with the mortgage. [20] Transfer of mortgage "papers" is not necessary to effect the conveyance of beneficial interest in the mortgage upon assignment or negotiation of the underlying obligation to the assignee. *Johns v. Gillian* 134 Fla. 575 184 So. 140 (Supreme Court of Florida 1938).[21]

Given that these authorities cited to the lower Courts remains good law in Florida, it is difficult to see how the Circuit Court could be persuaded that Citimortgage, Inc. could bring a foreclosure action, in its own name and claim to be the party to whom the debt was owed, *after* it had already negotiated the note to Citibank, FSB. Even assuming that Citimortgage, Inc. retained the right to foreclose the mortgage after negotiating the note to Citibank, FSB, it *still* misrepresented the debt by alleging in the foreclosure complaint and throughout the legal proceedings that it *owned* the promissory note. The Court misapplied the law by failing to observe this, despite petitioner's provision of abundant and clear authority.

This specific legal issue is of great importance at this time due to the unprecedented number of mortgage foreclosure actions being prosecuted throughout the country. This Court should grant the petition and provide guidance on this area of law to

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[20] *Manufacturers' Trust Co. v. People's Holding Co.*, 110 Fla. 451, 149 So. 5 (1933); See also *Baker v. Rowe*, 102 Fla. 622, 136 So. 681 (1931); *Collins v. W.C. Briggs, Inc.*, 98 Fla. 422, 123 So. 833 (1929).

[21] An assignment of the pledge of the mortgage without an assignment of the pledge of the note or obligation secured thereby creates no right in the assignee or pledgee. *Sobel v. Mutual Development, Inc.* 313 So.2d 77, (Fla. 1st DCA 1975)

bring uniformity to lower court decisions relating to the enforcement of negotiable instruments.

5. § 559 Part VI Florida Statutes. The Circuit Court's misapplication of the law, relative to petitioner's state law claims, is apparent by the absence of any reference to Florida law, as precedent, statutory or otherwise within the District Court's judgment dismissing these specific claims. The District Court dismissed these claims by erroneously applying only federal law rather than Florida law.

6. The effect of the misinterpretation, misapplication, or extension of the law, as read in the Circuit Court opinion, serves to create three conditions that frustrate the purpose of the FDCPA. First, the decision results in the creation of unauthorized exemptions to compliance with the Act, as stated in this petition. Second, the holding becomes platform for debt collectors to continue extending the exemptions eventually achieving what this Court refused to grant with the arguments advanced in *Heintz*. This can be seen with the Circuit's extension of the *Vega* decision to communications about debts with third parties. Third, the decision has a chilling effect on consumer advocacy, which is in direct conflict with the Act's purpose to be self-enforcing. The holding in *Vega*, for example, has significantly impacted consumer advocate proclivity to dispute debts under the FDCPA on behalf of clients attempting to dispute debts from notices that have been delivered together with a summons and complaint. This is exceptionally troubling because consumer advocates are already disadvantaged by having to represent clients that in many cases do not have the resources to defend

themselves or to pay an attorney to advance their claims.

B. The Eleventh Circuit decision deprives consumers in Florida, Georgia and Alabama of their 14th Amendment right to equal protection under the law.

1. The 14th Amendment to the United States Constitution, at Section 1 guarantees consumers of the three states comprising the Eleventh Circuit, Alabama, Florida and Georgia the right to equal protection under the law. The complete enjoyment of that right, however, has been denied by the Circuit Court's decisions in *Vega*, and in the case subject of this petition in the following three (3) ways.

First, in the states comprising the Eleventh Circuit federal court's do not enforce the FDCPA for debt collector failure or refusal to comply with the verification requirements of the 15 U.S.C. § 1692g when consumers in legal actions invoke their right to dispute a debt. Therefore, consumers in these states are disadvantaged as compared to consumers in other circuits where the courts actually enforce the statute.[22]

Second, consumers in Alabama, Florida and Georgia are disadvantaged by judicial extensions to the FDCPA, in the form of exemptions from compliance with the Act and that favors attorney debt collectors. This puts causes of action beyond the

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[22] Specifically the Second, Third, Fourth, Fifth, Sixth, Seventh and Tenth Circuits.

reach of a would-be consumer plaintiff and fosters a culture of bias in favor of the debt collector. Consumers in Circuits that promote enforcement of the FDCPA, as written, enjoy greater rights than those living in the area of the Eleventh Circuit.

Third, based on the decision below, consumers in Florida who bring an action based on the Florida Consumer Collection Practices Act do not get the benefit of having the federal court apply state law to the factual basis of their claim. Rather, the Circuit's decision here authorizes the District Court to apply only federal law to dispose of these claims. Whereas, other Circuit Courts apply the appropriate state law to decide claims brought by consumers under the state-law-equivalent of the FDCPA in their jurisdiction.

Petitioner is prepared to fully brief these issues on the Court's granting of this petition.

C. The decision paves the way for continued abuses by debt collectors, including attorneys, at a time when consumers most need the protections of the FDCPA.

1. Leading up to the enactment of the FDCPA, Congress found "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."[23]

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[23] 15 U.S.C. 1692(a)

The Act also points to the inadequacy of then-existing laws for redressing injuries to consumers and to protect them.[24] There is absolutely no reason to believe that the abuses against consumers by debt collectors have subsided in any way. In fact, the opposite is true.

In 2000 the FTC Annual Report on the FDCPA reported the total number of complaints against third-party debt collectors to be 11,800 for 1999.[25] The 2008 FTC Annual Report on the FDCPA, reveals the total number of complaints to the FTC about third-party debt collectors rose to 70,951 in 2007, a six-fold increase from 1999.[26] The 2008 FTC Annual Report also shows that the conduct most complained of by consumers is that the debt collector has attempted to collect a debt that is not owed at all or a debt larger than what the consumer actually owes. *Id* at Pg 5. The debt validation dispute mechanism of 15 U.S.C. § 1692g was designed to attempt resolving this very type of problem that increasingly more consumers continue to complaint about.

2. Nowhere is this dispute mechanism more important than in the context leading up to and including debt collection legal action against a consumer. The consequences for the consumer can be quite dire where a judgment is awarded to a debt collector that either did not have the right to demand payment or did not have the right the demand the amount claimed. Having no mechanism to formally

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[24] 15 U.S.C. 1692(b)

[25] http://www.ftc.gov/os/statutes/fdcpa/fdcpa2000rpt.shtm

[26] www.ftc.gov/os/2008/03/P084802fdcpareport.pdf

dispute the debt, outside of the litigation process, leaves the consumer to no other choice but to try defending in litigation – at whatever the cost or risk. Petitioner's case is one example of how this works to the detriment of the consumer.

3. Example No. 1. Respondent Residential Funding Corporation (RFC), a mortgage company, brought an action in state court against petitioner seeking foreclosure of a mortgage. RFC alleged it owned the mortgage and the related promissory note under which petitioner purportedly owed over $80,000. Petitioner, having examined the original promissory note during discovery, asserted that RFC did not have standing to sue with his motion to dismiss. Relief was denied and the case was litigated for over three (3) years at significant expense to petitioner. RFC then filed an Affidavit admitting that some 30 months prior to bringing the action it had sold the mortgage loan to another institution and had nothing to do with the loan. (See App. 85) RFC, however, claimed it still had the right to sue petitioner. The Florida Court granted summary judgment in favor of petitioner on grounds that RFC, in fact, did not have standing to bring the action. (App. 79) The decision was affirmed by the Fifth District Court of Appeals.[27] (App. 84)[28]

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[27] *Residential Funding Corporation v. David Acosta*, 965 So.2d 149 (Fla. 5th DCA 2007)

[28] Irrespective of whether there has been a default under an obligation or not, petitioner maintains that a consumer owing a debt has the right to be sued by the right party and an also an absolute right to defend against a plaintiff having no standing to sue.

4. Similar Cases. In recent years federal and state courts around the U.S. have confronted the persistent problem of foreclosure plaintiffs that cannot prove sufficient standing to bring an action against a consumer borrower. In October 2007, U.S. District Court Judge Christopher Boyko (N.D. Ohio) made national headlines with the dismissal of 14 foreclosure cases where plaintiff's counsel could not show sufficient standing to invoke the Court's subject matter jurisdiction.[29] Although Judge Boyko was not the first judge to reach this conclusion and dismiss foreclosure actions, judges across numerous states have followed the lead questioning the right to sue by these plaintiffs.[30]

Consumers disputing debts being collected through legal actions should not be deprived of the right to dispute the debt and to obtain meaningful enforcement when the debt collector refuses to comply with verification. This Court can correct the problems facing consumers of the Eleventh Circuit by granting this petition and deciding this vitally important question of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[29] *In re Foreclosure Cases*, Not Reported in F.Supp.2d, 2007 WL 3232430 (N.D.Ohio,2007)

[30] If this petition is granted, during the briefing stage petitioner will cite to numerous 30 cases in various jurisdictions showing foreclosure plaintiff lack of standing and similar conduct as abuses against unsuspecting consumer borrowers.

Respectfully
Submitted,

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